No. 88-309

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In The

Supreme Court of the United States

October Term, 1988

STATE OF WYOMING,

Petitioner,

v.

UNITED STATES OF AMERICA, SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE OF THE WIND RIVER INDIAN RESERVATION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Wyoming

BRIEF OF AMICI CURIAE STATES OF ARIZONA, IDAHO, MONTANA, NEVADA, UTAH, AND WASHINGTON IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

In the absence of any demonstrated necessity for additional water to fulfill reservation purposes and in the presence of substantial state water rights long in use on the Reservation, may a reserved water right be implied for all practicably irrigable lands within a Reservation set aside for a specific tribe?

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BRIEF OF AMICI CURIAE STATES OF ARIZONA, IDAHO, MONTANA, NEVADA, UTAH, AND WASHINGTON IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICI CURIAE

In Idaho a general adjudication of all rights to the use of water for that portion of the Snake River Basin located within the state of Idaho is being processed in state court. As part of this proceeding, the state district court will enter a decree quantifying all federal reserved water right claims, including those the federal government holds for Indian tribes. Three Indian reservations are within the

geographic boundaries of the adjudication, and two of the reservations will have significant claims for irrigated agricultural use. Thus, amici state of Idaho has a vital and continuing interest in issues involving the quantification of federal reserved water rights for Indians. More directly, Idaho is negotiating with the Shoshone-Bannock Tribes of the Fort Hall Indian Reservation in the context of this litigation to quantify its federal reserved water right claims for agricultural use.[1] Since the Second Treaty of Fort Bridger of 1868, 15 Stat. 673, which created the Wind River Indian Reservation, applies also to the Fort Hall Indian Reservation, the outcome of this case will have a direct bearing on these negotiations.[2]

Since entry of the Court's decision in *Arizona v. California*, 373 U.S. 546 (1963), the amici state of Arizona has acquired extensive experience in quantifying Indian reserved water rights which may be valuable to this Court in considering application of the PIA standard to pending and future cases. Moreover, Arizona is now engaged in two general stream adjudications on the Gila

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[1] The United States and a group of private water users also participate in these negotiations.

[2] The Executive Order of June 14, 1867, 1 Kappler 835, created the Fort Hall Indian Reservation in southeastern Idaho. Article two of the Second Treaty of Fort Bridger of 1868 provided "whenever the Bannacks desire a reservation to be set apart for their use, or whenever the President of the United States shall deem it advisable for them to be put upon a reservation, he shall cause a suitable one to be selected for them." The Executive Order of July 30, 1869, 1 Kappler 838, designated the Fort Hall Indian Reservation as the reservation for the Bannocks.

and Little Colorado Rivers. The United States participates in these state court cases on behalf of 14 affected tribes asserting reserved right claims of very significant magnitude. *See Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545 (1983). Thus, Arizona has a vital and continuing interest in issues involving quantification of federal reserved water rights for Indian reservations.

The other amici states have Indian reservations within their borders. These amici are currently parties in litigation regarding the quantification of federal reserved water rights for agricultural irrigation use within Indian reservations. *See, e.g., State v. Acquavella*, Yakima County Superior Court No. 77-2-01484-5 – a general adjudication of the Yakima River basin system which includes the United States as a party claiming, among others, agricultural irrigation water rights relating to the Yakima Indian Reservation. These states have an interest in the outcome of this case because it may well establish the appropriate approach for quantification of implied federal reserved water rights for Indian reservations within these states.

SUMMARY OF ARGUMENT

The question before the Court is the appropriate standard for quantification of the implied reserved water right for agricultural purposes at the Wind River Indian Reservation. In *Winters v. United States*, 207 U.S. 564 (1908), this Court created the implied reservation of water doctrine for an agricultural Indian reservation. The

basis for this doctrine was the need of the Indian reservation for water to achieve its primary purpose of converting a nomadic people to a pastoral life that relied on agriculture for support. 207 U.S. at 576. In *Arizona v. California*, 373 U.S. 546 (1963), this Court affirmed a water right quantification for five agricultural Indian reservations in the lower Colorado River basin of Arizona, California, and Nevada based on a practicably irrigable acreage standard specially developed by the Court's special master for those reservations.[3]

This Court has recognized that federal reserved rights for water or for other natural resources inevitably displace persons who are not beneficiaries of the federal reserved right. Consequently, this Court in other federal reserved claims context has recently emphasized the need to be sensitive to this displacement and to recognize federal reserved rights only to the extent necessary to achieve the primary purposes of the federal reservation. In *Cappaert v. United States*, 426 U.S. 128 (1976) this Court praised the federal district court because it "tailored its injunction, very appropriately, to minimal need, curtailing pumping only to the extent necessary to preserve an adequate water level . . . " 426 U.S. at 141. The amici urge that this Court direct the Wyoming Supreme Court on remand to do the same thing – tailor the quantification of the implied reserved water right to needs at the WRIR.

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[3] In *Arizona v. California*, 460 U.S. 605 (1983), this Court discussed the PIA standard for five Indian reservations in Arizona, California, and Nevada and concluded that the prior litigation precluded reopening the Court's prior calculation of the amount of PIA. 460 U.S. at 625-626.

ARGUMENT

I.

THE JUDGMENT OF THE WYOMING SUPREME COURT INCORRECTLY QUANTIFIED THE IMPLIED RESERVED WATER RIGHT FOR THE WIND RIVER INDIAN RESERVATION BECAUSE THE COURT FAILED TO ANALYZE THE NEED OF THE RESERVATION FOR THE WATER

A. Introduction

This case raises the fundamental question of how to quantify a federal reserved water right for an Indian reservation. The Wyoming state courts awarded a reserved water right to the Shoshone and Northern Arapaho Tribes for all practicably irrigable acreage within the present boundaries of the Wind River Indian Reservation, hereinafter "WRIR," under the implied reservation of water doctrine. The federal reserved water right was quantified in the approximate amount of 500,000 acre-feet per annum, for the irrigation of some 100,000 acres with a priority as of 1868, the date of the treaty establishing the WRIR. 753 P.2d at 105-106, Pet. App. A, at 56a-58a. Pursuant to congressional directive in 1905, however, water rights for the irrigation of 145,000 acres of Indian lands had been obtained under state law, overlapping more than 70% of the lands for which the reserved right was subsequently granted. This overlap is inconsistent with this Court's past rulings that a reserved water right is limited to that amount minimally necessary to achieve the primary purposes of the reservation. If the decision of the Wyoming Supreme Court is allowed to stand, it will continue the confusion regarding the appropriate measure of a federal reserved water right and undermine the efforts of the amici states to resolve claims for reserved

water rights for Indian reservations within their respective states.

B. Decisions of this Court Hold that Federal Reserved Water Rights are Limited to the Minimal Amount of Water Necessary to Achieve the Primary Purposes of a Federal Reservation

In *Winters v. United States*, 207 U.S. 564 (1908), this Court held that the United States impliedly reserved a water right insofar as it was reasonably necessary to accomplish the agricultural purpose of an Indian reservation when the United States withdrew land from the public domain and reserved it for an Indian reservation. In determining necessity, this Court has indicated that the reserved water right is that amount minimally necessary to achieve the primary purposes of the reservation. In *Cappaert v. United States*, 426 U.S. 128 (1976), for example, this Court in concluding that a Proclamation establishing a National Monument under the American Antiquities Preservation Act of June 8, 1906, ch. 3060, 34 Stat. 225, 16 U.S.C. § 431, created a federal reserved water right for Devil's Hole stated: "The implied-reservation-of-water doctrine, however, reserves only that amount of water *necessary* to fulfill the purpose of the reservation, no more." 426 U.S. at 141 (emphasis added). The District Court then "tailored its injunction, very appropriately, *to minimal need*, curtailing pumping only to the extent necessary to preserve an adequate water level at Devil's Hole." *Id.*

As this Court, subsequently, recognized in *United States v. New Mexico*, 438 U.S. 696 (1978), limiting federal reserved water rights to minimal needs allows for the

reconciliation of the competing federal policies of protecting federal reservations and of deferring to state water law.

> Each time this Court has applied the "implied-reservation-of-water doctrine," it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated. . . .
>
> *This careful examination is required both because the reservation is implied, rather than expressed, and because of the history of congressional intent in the field of federal-state jurisdiction with respect to allocation of water.* Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law. . . .Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water.

438 U.S. at 700-702 (emphasis added) (citations and footnotes omitted). Thus, necessity is the basis and measure of a reserved water right because of the implied nature of the right and because of the long-standing national policy of deference to state water law.[4]

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[4] This deference began when Congress enacted section 9 of the Mining Act of July 26, 1866, ch. 262, 14 Stat. 251, 253, that recognized "rights to the use of water . . . acknowledged by the local customs, laws, and the decisions of courts" and continues to the present. *See California v. United States*, 438 U.S. 645 (1978). For a listing of 37 statutes recognizing the applicability of state water law, *see* Hearings on S. 1275 before the

(Continued on following page)

Furthermore, then Justice Rehnquist noted that "[i]n the arid parts of the West, . . . claims to water for use on federal reservations inescapably vie with other public and private claims for the limited quantities to be found in the rivers and streams." 438 U.S. at 699. As a practical matter, recognition of a federal reserved water right frequently causes "a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators." 438 U.S. at 705. By limiting federal reserved water rights to that amount minimally necessary to achieve the primary purposes of a federal reservation, the conflict between competing claimants to a limited water supply is reduced.

This Court has similarly limited tribal claims for other natural resources to that amount minimally necessary to provide a livelihood for the tribe. In the context of an express reservation in an Indian Treaty of a right to take anadromous fish that pass through tribal fishing grounds, for example, this Court stated:

> As in Arizona v California and its predecessor cases, *the central principle here must be that Indian treaty rights* to a natural resource that once was thoroughly and exclusively exploited by the Indians *secures so much as, but no more than, is necessary to provide the Indians with a livelihood – that is to say, a moderate living.*

Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658, 686 (1979) (emphasis added)

(Continued from previous page)

Subcomm. on Irrigation and Reclamation of Senate Committee on Interior and Insular Affairs, 88th Cong., 2d Sess. 302-310 (1964) (App. B, Supplementary Material submitted by Sen. Kuchel.)

Thus, although stated in different ways, this Court has characterized necessity in each case as the fundamental basis and measure of the federal reserved right to a natural resource in much the same manner as beneficial use is the basis and measure of an appropriative water right.[5]

C. The Wyoming Supreme Court Failed to Analyze the Need of the Wind River Indian Reservation for the Water

The Wyoming Supreme Court's analysis of the necessity for water at the WRIR is short. 753 P.2d at 100-101, Pet. App. A, at 47a. The court acknowledges the existence of a "needs test" from *Cappaert, New Mexico,* and the *Passenger Fishing Vessel* cases but then concludes that the certainty inherent in the PIA standard requires use of that quantification standard. 753 P.2d at 101, Pet. App. A, at 47a. The fallacy in this approach is the absence of a finding that equated the present and future needs of the Indians with the amount of water necessary to irrigate all the reservation's practicably irrigable acreage. In *Arizona v. California,* the Special Master "found that the water was intended to satisfy the future as well as the present needs of the Indian Reservations and ruled that enough water was reserved to irrigate all the practicably irrigable acreage on the reservations." 373 U.S. at 600. Thus, the Court

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[5] Section 8 of the Reclamation Act of June 17, 1902, ch. 1093, 32 Stat. 388, 390, 43 U.S.C. § 372 incorporated a general provision of western water law that "beneficial use shall be the basis, the measure, and the limit of the right."

found that PIA equalled the minimal needs of the tribes. The absence of that finding for the WRIR resulted in the Wyoming courts undertaking a very inflexible, hypothetical PIA analysis not related to the needs of the WRIR for water.

II.

THE INFLEXIBLE, HYPOTHETICAL METHOD OF PIA ANALYSIS HAS PRODUCED UNREALISTIC CLAIMS

A. Introduction

The amici find the PIA methodology, while helpful in some instances in identifying a resource base that is susceptible to agricultural use, misses the mark in most instances with regard to quantifying the actual needs of a tribe. The unrealistic PIA claims are attributed to two factors.

First, PIA analysis focuses on land classification to the exclusion of an examination of existing water supplies. Because modern irrigation technology will permit irrigated agricultural production on lands that were previously not susceptible to irrigation, the total water needs of PIA lands far exceeds the natural water supply.

Second, under the PIA methodology, parties, instead of focusing on legitimate needs of the tribe, spend their time and money debating the viability of abstract irrigation projects that will never be developed. In general, tribes have little desire to develop extensive irrigation projects; yet, PIA allows tribes to maximize their implied reserved water right claim. Since PIA is based upon hypothetical projects there is an incentive to ignore real world constraints to further enhance claims. In many

instances, parties are led into a fantasy land of unrealistic discount rates and engineering schemes that defy the imagination. This subject is discussed more thoroughly in P. Sly, *Reserved Water Rights Settlement Manual* 101-105 (1988).

The amici recognize the legitimate needs of a tribe for water to develop their reservations. The PIA methodology, however, in most instances does not reflect tribal needs. Thus, performing a PIA analysis is a highly unproductive way of satisfying legitimate tribal needs and in most instances leads to controversy between the Indian and non-Indian communities.

B. The Experience in Arizona Demonstrates the Unrealistic Claims Produced by a PIA Analysis

Arizona has 20 Indian reservations covering 28% of the state's land area. Five of them are located on the main stream of the Colorado River while the remainder are distributed throughout the state, some on the lower reaches of its major interior drainages, others at the headwaters of these streams. The reservations provide homelands for tribes with varied and contrasting cultures. Some are traditional farmers, others have historically practiced very little agriculture.

In *Arizona v. California*, this Court found that tribal reserved rights included an amount of water reasonably necessary to irrigate all the reservation land which could "practicably" be made productive. The Court chose this formula instead of a measure based on present Indian population or projected need. When it was applied, the five tribes whose rights were determined in the case

received 34.3% of the water allotted to Arizona from the main stream of the Colorado River. While this was a large award, it was "new" water which had not previously been used in Arizona. Thus, new irrigated lands could be developed on the reservations without retiring existing lands from production. Full recognition of tribal claims did not require the "gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators," which this Court later recognized to be a consequence of applying the reserved right doctrine in an arid region. 438 U.S. at 705.[6]

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[6] Since application of the PIA standard in *Arizona v. California*, the reserved water rights have been determined for three additional Arizona reservations with an agricultural history predating European contact through litigation and settlement approved by Congress. The reservation lands were located within areas irrigated by the tribes at the time of American settlement. Water to supply the tribes will come primarily from groundwater pumping and from the "new" Colorado River supply being diverted into the state through the Central Arizona Project. Essentially, these settlements confirm to the tribes rights which were acknowledged to be theirs at the time the reservations were established and provide means to develop them. Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988, Pub. L. 100-512, 102 Stat. 2549; Act of July 28, 1978, Pub. L. No. 95-328, 92 Stat. 409, as amended by Act of October 19, 1984, Pub. L. No. 98-530, 98 Stat. 2698 (Ak-Chin Indian Community); Southern Arizona Water Rights Settlement Act of 1982, Pub. L. No. 97-293, Title III, 96 Stat. 1274 (Papago Tribe). These settlements involved conflicting claims to ground water and arose not from general adjudications but from actions against the federal government for failure to protect and develop water resources and injunctive actions to restrain non-Indian pumping. Nevertheless, the settlements quantified all reserved water rights.

The two general adjudications now proceeding through state courts in Arizona[7] include large reserved right claims for tribal lands which may be irrigable but have no history of agricultural use. For example, in the *Gila Adjudication*, the Gila River Indian Community asserts a reserved water right of 1,599,252 acre-feet per annum based upon 266,542 irrigable acres on the reservation. Historically, maximum cultivation on this reservation, as reported by the Court of Claims, was 7,000 to 8,000 acres. *See Gila River Pima-Maricopa Indian Community v. United States*, 684 F.2d 852, 860-61 (Ct. Cl. 1982). The Court commented that this asserted reserved right alone exceeds the entire flow of the Gila River, except in peak flood years.[8] Upstream from this reservation, the

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[7] Arizona enacted legislation in 1979 providing new procedures for conducting several stream adjudications. Ariz. Rev. Stat. Ann. § 45-251 *et seq.* Under this law, two cases were commenced: *In Re: The General Adjudication Of All Rights To Use Water In The Gila River System And Source*, Maricopa County Superior Court No. W-1, W-2, W-3, W-4 (Consolidated); *In Re: The General Adjudication Of All Rights To Use Water In The Little Colorado River System And Source*, Apache County Superior Court No. 6417. The Gila River, with its tributaries drains the southern half of Arizona; while the Little Colorado, with its tributaries drains most of the northern half of the State.

[8] 684 F.2d at 864. The Court of Claims was considering a tribal claim against the United States for failure to protect and develop its water rights. It discussed but did not decide whether the reservation had been established for an agricultural purpose. To date, the purpose for establishing the Gila, San Carlos, Navajo and Hopi Reservations has not been determined. Tribal reserved right claims, for the most part, are based on the premise that these reservations were established for agriculture and should be measured by the amount of practicably irrigable acreage.

San Carlos Apache Tribe asserts a reserved right claim for an additional 571,842 acre-feet on behalf of the San Carlos Apache Indian Reservation. There are an additional eight tribes with unquantified claims against the Gila.[9]

In the *Little Colorado Adjudication*, the Navajo Tribe has filed a reserved right claim for 313,880 acre-feet, annually, of surface flow. The Hopi Tribe claims 81,850 acre-feet. The two tribes together make reserved right claims of 395,730 acre-feet against a source, the Little Colorado River, which has an average annual watershed production of only 388,650 acre-feet.[10]

These general adjudication claims resemble those of the Colorado River tribes in that water is demanded for previously undeveloped land. But, unlike tribal claims to the unallocated Colorado mainstream and the rights of the three interior tribes quantified after that decision,

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[9] Yavapai/Apache Camp Verde, Papago Florence Village, Fort Apache, Fort McDowell, Gila Bend, Hualapai, Tonto Apache, and Prescott-Yavapai. Information from Statement of Claimants on file with the Arizona Department of Water Resources.

[10] Total flow of the Little Colorado less the flow of Blue Spring, which is located close to the point where the Little Colorado empties into the Colorado River. U.S. Dep't of Agriculture, *Little Colorado Arizona-New Mexico Summary Report*, at 27, App. II at 575 (1981). The tribes expect "new" water to be created by an irrigation project requiring a dam and reservoir on the Little Colorado. However, the economic feasibility of such a proposal has not been established and Congress has not authorized its construction.

claims of the Gila River Pima, San Carlos Apache, Navajo and Hopi Tribes alone exceed the available supply. Even if all the water were allotted to the tribes by strict application of the doctrine of prior appropriation, the tribes would remain in conflict with each other on both the Gila and Little Colorado Rivers for a still inadequate source.

Arizona's experience suggests a clear need to refine the PIA standard in light of physical limitations which were not present on the Colorado River. In fact, the recent actions of one Arizona court illustrates some of the problems inherent in applying the existing PIA standard in a water-deficient drainage.

On September 9, 1988, the *Gila Adjudication* trial judge directed the Arizona Department of Water Resources, its technical adviser, to measure all Indian reserved right claims using PIA, stating his belief that such action was mandated by the holding in *Arizona v. California*, 460 U.S. 605 (1983). Many parties question this interpretation of the law which assumes, as a basis for applying the PIA measure, that all reservations were created for agricultural purposes. The trial court also has indicated that any determination of reserved rights cannot exceed the amount of water produced by the river system. While this seems a logical statement, no guidelines exist for applying it. For example, in Arizona, only surface water is allocated by the doctrine of prior appropriation. If Indian reserved water rights under federal law exceed the surface supply, the court must consider whether to satisfy them from the groundwater resource, in contravention of state law which protects groundwater users against prior appropriators. *Maricopa County Municipal Water Conservation District No. 1 v. Southwest*

Cotton Co., 39 Ariz. 65, 4 P.2d 369, *rehearing denied*, 39 Ariz. 367, 7 P.2d 254 (1932).

Assuming that tribal claims in excess of watershed production are established, Arizona courts must decide whether to cut off all non-Indian surface and certain undetermined groundwater users in favor of tribal rights, to apportion the inadequate supply in some equitable manner among competing claimants or to restrictively interpret the PIA measure in the presence of desert conditions where water will never be sufficient to irrigate all the otherwise arable land.

C. The Experience of Idaho in the Negotiations Regarding Implied Federal Reserved Water Rights at the Fort Hall Indian Reservation Demonstrates That the PIA Standard Produces Unreliable Results

The Shoshone-Bannock Tribes and Idaho began substantive discussions regarding the implied federal reserved water right for agricultural use at the Fort Hall Indian Reservation using the PIA methodology. Idaho soon found that small changes in underlying parameters used in the PIA analysis made dramatic changes in the amount of irrigable acres. For example, the parties did not agree on cropping patterns, discount rate, arable land, or engineering feasibility. In short, use of PIA proved to be divisive.

Two of the projects proposed for the Fort Hall Indian Reservation require a trans-mountain diversion of water through a tunnel to deliver water to the proposed project lands. The enormous capital costs of these projects were to be offset by benefits realized by growing carrots, a

specialty crop, and attaining yields on other crops that exceed those obtained by the non-Indian farmers in the same area.

The recent discussions have shifted to the total amount of water required to satisfy their claim and the means to provide that water without impact on existing non-Indian users. By shifting away from PIA the parties have been able to make progress. Yet, the lack of clarity regarding whether PIA is the sole means for quantifying a federal reserved water right for agricultural use on an Indian reservation continues to frustrate negotiations.

D. The Experience of Washington in Litigation Regarding Implied Federal Reserved Water Rights of the Spokane Tribe in Chamokane Creek Basin Demonstrates That the PIA Standard Produces Anomalous Results

Application of the PIA standard has also resulted in an anomalous quantification of a reserved water right in relation to the "general adjudication" of Chamokane Creek, a small tributary stream of the Spokane River, which flows through the semi-arid Spokane Indian Reservation of northeastern Washington State. *See United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984). The court there confirmed water rights to the Spokane Indian Tribe for both "instream" fishery rights of approximately twenty cubic feet per second and agricultural irrigation right for more than eight thousand acres (applying a strict PIA standard) based on the federal reserved rights doctrine. In addition, the court confirmed rights to numerous non-tribal member water users, including the United States, created primarily under state laws. The peculiarity of the

rights confirmed to the Tribe for irrigation use centers, in part, on the modest natural flow of Chamokane Creek. There is considerable doubt, if these senior priority rights are attempted to be exercised to its full extent, that irrigation of the eight-thousand acres could be accomplished due to natural flow limitations. Further, if such an exercise did take place, there would be no ability whatsoever to satisfy any of the equally senior priority "instream rights" also confirmed to the Tribe, not to mention any of the many junior priority water rights based on state law confirmed by the court that are held by non-tribal parties, including the United States. Further ironies of the reserved irrigation water right quantification by the court (following strictly the PIA standard with its non-need inquiry aspect) include the fact that very few of the eight thousand acres have either in the past or are presently being irrigated. In addition, it is of note that the Tribe stated to the court during trial that the Tribe had no intent to exercise in the future the quantified irrigation rights associated with the large remaining tract of unirrigated land. *United States v. Anderson*, No. 3643 (E.D. Wash. December 21, 1981) (Report and Recommendation of United States Magistrate Re Motion to Amend Memorandum Opinion and Order, and Judgment) (unpublished).

E. Clarification of the Implied Federal Reserved Water Right Quantification Standard Will Reduce Conflict Between Indian and Non-Indian Water Users

Any general stream adjudication requires several years to complete. Approximately, 145,000 individual

claims are projected for the Snake River Basin Adjudication in Idaho. There are 63,000 individual claims on file with the Arizona court in the Gila Adjudication, 11,000 in the Little Colorado. The adjudication process on these streams could easily continue another 10 years before entry of appealable decrees, and thereafter, the status of all water rights will remain unclear until the appellate process is completed. Based upon experience since 1963, the amici believe that quantification of tribal reserved right claims by negotiation and settlement has provided an effective and equitable alternative to protracted litigation. Early resolution removes the cloud of uncertainty over non-Indian rights and allows amici to plan and effectively manage their water resources. Early resolution for the tribes means the prospect of economic development. Yet, negotiations are being seriously impeded because the applicable law is so uncertain.

Direction from this Court concerning application of the PIA standard under the truly arid condition of the amici states seems appropriate at this time. In the amici's view, as the law exists today, lower courts cannot know, when evaluating tribal claims, whether they must inquire into the purpose for creating each reservation or if all are to be considered agriculturally based. They cannot know whether PIA is the sole measure of an Indian reserved right or whether this standard is only one consideration which might be relevant in an arid region where the streams do not generate enough water to irrigate all the land which can be made productive. Without guidance, pending adjudications may remain stalled in litigation and rights unquantified while legal argument over these issues consumes time and resources.

The amici believe that this Court could reduce the amount of existing tension between states and tribes and eliminate a large part of the litigation arising from federal Indian reserved water rights by providing a clear statement that water needs of an agricultural Indian reservation be quantified based upon need. The amici will suggest that necessity requires the balancing of many factors, one of which may be the use of PIA methodology.

III.

THIS COURT SHOULD DIRECT TRIAL COURTS TO FAIRLY AND EQUITABLY TAILOR THE IMPLIED RESERVED WATER RIGHT DETERMINATION FOR AGRICULTURAL INDIAN RESERVATIONS TO THE NEEDS OF AN INDIVIDUAL RESERVATION

The needs of an individual agricultural Indian Reservation may differ with locale; therefore, amici believe that PIA should not be the sole basis for determining an Indian reserved water right for an agricultural Indian reservation. Instead, trial courts should be directed to fairly and equitably tailor the implied reserved water rights based upon the needs of an individual agricultural Indian Reservation. Need is not an absolute concept. Thus, in determining need trial courts should examine a number of factors. For the WRIR the amici believe an examination of the following factors is required at a minimum: (1) the amount of water delivered to Indian lands pursuant to congressional or executive action, (2) the amount of irrigable acreage, (3) the water supply available for those needs, (4) the amount of land historically irrigated and (5) the amount of water necessary to provide a tribe a livelihood as an agricultural community.

This Court created the Winters doctrine to assure that an agricultural Indian reservation was not deprived of a needed water supply as a result of congressional or executive branch neglect. *Winters v. United States*, 207 U.S. 564 (1908). The Winters doctrine fulfills the United States' moral obligation to its Indian population. In many instances, however, Congress and the executive branch recognized the federal government's moral obligation to supply water for agricultural Indian reservations by constructing Indian irrigation projects. In those instances where Congress or the executive branch has provided water through an Indian irrigation project, it is inappropriate for a court to imply reserved water rights for lands served by the project.

Common features of Indian irrigation projects are storage reservoirs that store water during high flow periods and the nonirrigation season for use during low flow periods. Storage reservoirs for Indian irrigation projects provide several obvious benefits. First, reservoirs assure a dependable supply of water for project lands during drought and during the normally low flow period of late summer. Second, storage reservoirs reduce the need for the Indian irrigation projects to divert natural flow water that supplies non-Indian users. Thus, storage reservoirs satisfy the moral obligation of the federal government to provide a dependable water supply to the Indians while minimizing the impact on non-Indians.

In light of this congressional balancing of competing interests, this Court should not imply a federal reserved water right for project lands. Instead, a federal reserved water right should only be implied for lands for which it is shown that Congress or the executive branch did not

provide a water supply. A contrary holding would unsettle expectations of water users within the system and would wreak havoc on the state water law allocation doctrines in the western states.

The WRIR is an example of an agricultural Indian reservation where the United States undertook a massive irrigation project for the benefit of the Tribes. In the process, the United States acquired state water rights in accordance with a 1905 federal statute for that project. Act of March 3, 1905, ch. 1452, 33 Stat. 1016. Historically, water has been delivered to the WRIR under those state water rights for about eighty years. The requirement to deliver that water in accordance with those state water rights is a fact known to all water users since the initiation of the appropriation by the United States. If that water is suddenly transformed to an 1868 priority, the entire priority system on the river would be reshuffled and unnecessary adverse impacts on existing water users would result.

The bottom line for any court determining federal reserved water rights for agricultural Indian reservations should be the assurance of delivery of sufficient water to provide a tribe a moderate living as an agricultural community. 443 U.S. at 686. If a court can meet that goal and reduce the adverse impact on non-Indians, then a court should do so. Under the judgment of the Wyoming courts, the Shoshone and Northern Arapaho Tribes received a water supply far in excess of their need, as demonstrated by the recent agreement they entered with the State of Wyoming to forego the exercise of their right for a year in exchange for five million dollars. The practical effect of the judgment is that the non-Indians are

buying back water that they have historically used and which the tribes do not need. Such a result creates animosities between Indian and non-Indian communities and should be avoided.

The second factor, i.e., the amount of irrigable acreage, obviously provides a convenient starting place for analysis of lands not served by water under a state water right. However, the usefulness of an irrigable acreage analysis may be skewed any desired way by use of unjustified parameters in the analysis. The only justified parameter is one that is based on the real world.

The third factor provides the absolute cap on a federal reserved water right for an agricultural Indian reservation. A federal reserved water right can obviously be no better than the entire natural flow of the particular stream.

The fourth factor provides one measure of need for an agricultural Indian reservation. While amici recognize that many factors may influence the decision to develop for irrigation a parcel of land, sustained irrigation through good and bad times is the best evidence of irrigability of land.

The fifth factor is a direct implementation of the *Passenger Fishing Vessel* case that an allocation of a natural resource to an Indian tribe should be no greater than the amount necessary to provide a moderate living. 443 U.S. at 686.

In brief, this Court can materially assist the process of fairly quantifying federal reserved water rights for Indian reservations by telling lower courts they may look

beyond the rigid PIA formula enunciated in *Arizona v. California*. In amici's view, sole reliance on PIA to quantify federal reserved water rights will not produce consistent or equitable results in pending cases, despite its past successes. Instead, the trial courts should fairly and equitably tailor the implied reserved water rights based upon the needs of an individual agricultural Indian reservation.

CONCLUSION

For these reasons, this Court should reverse the Wyoming Supreme Court judgment and direct that fact finding occur to determine the need of the Wind River Indian Reservation for water.

RESPECTFULLY SUBMITTED this 9th day of March 1989.

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